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IN THE

Supreme Court of the United States

October Term, 1987

MICHAEL N. SHERIDAN
and
MARY A. SHERIDAN,
Petitioners,

vs.

THE UNITED STATES

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, § 1346 (b) provides, in pertinent part:

> Subject to the provisions of Chapter 171 of this title [28 USC § 2671-2680], the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee for the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Title 28, United States Code, § 2680 provides, in pertinent part:

The provisions of this chapter and § 1346 (b) of this title shall not apply to—

* * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract right: Provided, that, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and § 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, ''investigative or law enforcement officer'' means any officer of

the United States who is empowered by law to execute searches, to seize evidence or to make arrests for violations of Federal law.

Title 28 USC § 2674, provides, in pertinent part:

Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgement or for punitive damages.

STATEMENT OF INTEREST OF AMICUS

Pursuant to Rule 36.2 of the Rules of the United States Supreme Court and the written consent of the Parties, (attached in the Appendix hereto), this Amicus Brief is submitted on behalf of eight young men (and their parents) who, as young boys were molested, sexually assaulted, and abused as a direct and proximate result of the negligence of various employees or agents of the United States Government acting within the course and scope of their employment. This Amicus Brief is submitted on behalf of the Plaintiffs in *Bennett, et al. v. United States,* 803 F.2d 1502 (1986), one of three cases in which the Ninth Circuit recently decided that claims based on the types of issues presented in the case before the Court, *Sheridan, et al. v. U.S.,* 823 F.2d 820 (1987), were not barred by 28 USC § 2680(h); and it is for that reason that this Amicus has an interest in this Court's resolution of *Sheridan, supra,* because the decision in *Sheridan, supra,* may ultimately effect the final outcome of *Bennett, supra,* in spite of the opinion of the Ninth Circuit. Furthermore, the *Bennett* case provides this Court with an excellent example of why these types of cases must be resolved pursuant to basic tort principles, as required by the Federal Tort Claims Act, whether by application of the "separate and independent duty" analysis, or the "negligent hiring and supervision" concepts; and why to do otherwise leads to the absurd results which occur if only the employment status of the person who inflicts the immediate injury is considered.

Any decision of the "question presented" in *Sheridan, supra,* and every "subsidiary question fairly included therein," U.S. Supreme Court Rule 21.1(a), must be decided in the best public policy tradition of this Court. Any broad and inartful stroke, such as the dicta in *Shearer v. United States,* 473 U.S. 52 (1985), which unfairly and improperly summarily denies

injured persons, otherwise entitled to recover pursuant to the Federal Tort Claims Act the opportunity to establish the essential elements of their claim at trial, pursuant to a misinterpretation of 2680(h), does those claimants an injustice and our society a disservice, as such a decision would be legally incorrect.

SUMMARY OF ARGUMENT

The United States is liable pursuant to the Federal Tort Claims Act in the same manner and to the same extent as a private person under like circumstances. 28 USC § 2674. A private person would be liable to Plaintiffs such as the Plaintiffs in *Bennett, et al. v. United States, supra,* in Arizona, "the place where the act or omission occurred," 28 USC § 1346(b), if the tort claimants carry their burden of proof and establish the elements necessary to prevail on a negligence claim in Arizona.

Inconsistent results among States and Circuits are anticipated and inevitable within the Federal Tort Claims built-in scheme of things. It is this peculiar aspect of these 2680(h) cases to which this Court should pay particular attention.

It is too easy to get side-tracked with the subsidiary issues in these cases such as the "special duty" or "independent duty" considerations; the negligent hiring or supervision of an "employee" versus a third person non-government employee; the on-duty, off-duty business. Indeed, the analysis of and reliance upon one or more of these various considerations has only served to confuse the basic question in the past. Certainly a correct and proper analysis and resolution of these subsidiary issues should be undertaken to the extent necessary to resolve the basic question underlying these types of cases, but the basic question presented should not be left unanswered in favor of a continuation of one of the exceptions which has

been created and carved out in the law when dealing with the difficult situations created by 2680(h), or more accurately, a misunderstanding of 2680(h).

But 2680(h) is not and should not be a bar to injured persons whose claims arise out of the negligence of government employees, and this Court should say so. Such a holding will in no way deprive the Government of the intended immunity for claims arising out of assault, battery, false imprisonment, etc. Only in those cases where the antecedent negligence can be established by the Plaintiff as a proximate cause of his injury will he be entitled to recover. And only in those cases where he can establish that the assault and battery (the immediate cause of his injury) was foreseeable will he be able to establish all of the elements necessary to recover on a claim based in negligence.

Proof of negligence by the Plaintiff may well require the consideration of the numerous subsidiary issues of "notice," "independent duty," "negligent hiring or supervision," "employee," "non-employee - third party," "on-duty," "off-duty," and perhaps other matters; but those issues must be resolved within the framework of a correctly analyzed opinion from this Court holding that the United States is liable for negligence according to the substantive law of negligence of the place where the act or omission occurred, pursuant to the Federal Tort Claims Act, in the same manner and to the same extent as a private person under like circumstances; the mere fortuitous presence of an assault and battery should not, in and of itself, have any effect upon the negligence claim, and most certainly should not provide the basis for a summary disposition of the claim.

ARGUMENT

I. FACTUAL BACKGROUND OF BENNETT, ET AL., V. UNITED STATES, SUPRA

The claimants,[1] under the FTCA in Bennett, are the parents of and the eight Navajo boy children who were victimized by acts of molestation and/or sexual assaults perpetrated by one Terry Lee Hester, a Bureau of Indian Affairs employee at the remote Kaibeto Boarding School in the interior of the Arizona portion of the Navajo Indian Reservation, said acts primarily occurring either at Hester's living quarters or a classroom located on the Kaibeto Bureau enclave primarily during Hester's off-duty hours. Hester was convicted in an Arizona district court of violation of criminal statutes on eleven counts for his actions perpetrated on the plaintiffs.

The undisputed facts are as follows:

When Mr. Hester applied for employment with the BIA, he listed on his SF-171 application for Government employment a prior Oklahoma charge of "outrage to public decency" which charge had resulted from similar conduct. Notwithstanding this disclosure, the BIA made no effort to determine the nature of this charge and proceeded to hire Mr. Hester and place him in a position of trust vis-a-vis young students in a

[1]These Amici cases arise from the U.S. District Court for the District of Arizona, from which the Plaintiffs appealed the granting of the government's motion to dismiss; therefore, all facts as pleaded by the Bennetts must be accepted as true. In any event, all the facts relied upon by the Bennetts, et. al., were garnered either through discovery or upon examination of the record of the criminal trial. Accordingly, it is doubtful that the government could contest any of the Bennetts' allegations.

BIA boarding school. Hester was hired as a teacher at the Kaibeto Boarding School at Kaibeto, Arizona, for the school year 1980-1981.

The United States Government had been put on notice of Hester's criminal propensities by Mr. Hester's disclosure of prior charges or offenses for sexual misconduct with minors on his employment application; yet the Government hired him and placed him in a position of trust and responsibility towards the Plaintiffs, allowing him free access to his victims.

Further, the government subsequently failed and refused to properly supervise Hester's activities and negligently allowed these activities to continue dispite having been put on notice and despite obvious signs of misconduct, such as a parent's complaint that her son had been sexually molested, as well as repeated and frequent incidents of Mr. Hester checking boys of a certain age group out of the dorm, and the continual procession of young boys in and out of his residence.

Despite this, the government negligently awarded a renewal contract to Mr. Hester, which meant that he was permitted to continue his employment at the school in the fall of 1981.

II. THE GOVERNMENT'S INDEPENDENT DUTY TO THE BENNETT PLAINTIFFS.

The government breached its duty to the then minor Navajo children by failing to provide a safe environment and to watch over and protect the minors from harm and injury.

The significance of the status of the boys as Indians and particularly Navajos comes into play in the panoply of Federal statutes relative to the education of Indians and the operation

of boarding schools as well as the special Treaty duty afforded members of the Navajo Tribe of Indians regarding education.[2]

The federal government represented to the Plaintiff parents in *Bennett* that instructors of good moral character would be employed, 25 USC § 271, that the Superintendent of Indian Schools would visit and inspect the schools for defects and establish standards for basic education of Indian children in Bureau Schools, 25 USC § 2001; establish national criteria for dormitories including counselling and privacy, 25 USC § 2002; regulatory requirements for educators, 25 USC § 2011; develop Bureau education policies, practices and procedures, 25 USC § 2013; and develop rules and regulations to insure the constitutional and civil rights of Indian students, 25 USC § 2017. Further, regulations adopted in 25 CFR Part 32, Indian Education policies set forth a plethora of duties

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[2]Treaty between the United States of America and the Navajo Tribe of Indians concluded June 1, 1868, ratification advised July 25, 1868; proclaimed August 12, 1868 (15 Stat. 667) of which Article VI states that the United States would provide education of the Navajos "in order to insure the civilization of the Indians," and required the government to provide a competent teacher and attendance was compulsory. The Treaty provides in part as follows:

> " . . . and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians and faithfully discharge his or her duties as a teacher."

Originally, this duty was a treaty obligation, subsequently voluntarily undertaken by Congress. See the Snyder Act, 25 USC § 12.

It has also been recognized by the United States Supreme Court that pursuant to Treaty obligations with the Navajo Tribe, the Federal Government has a duty to provide education and other services needed by Indians. See *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. 685, 690 (1965).

including compulsory school attendance for Indian children, use of federal Indian school facilities for community activities, development of policies reflecting the best interests of the student, student rights including freedom from cruel and unusual punishment, promotion of respect for the family, and so forth.

The actual incidents by Hester ranged from fondling the boys' genitals, forcing them to perform fellatio on him, writing obscenities on a boy's body after forcing him to disrobe, attempted anal penetration of one boy with a wooden support rod projecting from a plant, and forced acts of sodomy.

III. ANALYSIS OF STATUTORY PROVISIONS AND STATE LAW

The Federal Tort Claims Act renders the United States liable for torts essentially in the same manner and to the same extent as an individual, in like circumstances, under the law of the state where the wrong occurred. *Ravonier, Inc. v. United States*, 352 U.S. 315 (1957). The law of the state in which the negligent act occurred is the applicable law. 28 USC § 1346(b), 28 USC § 2672. The law in Arizona, as developed in the body of this brief both as to duty and causation mandates recovery by these tort claimants if the tortfeasor were a private individual.

A. THE GOVERNMENT'S RELIANCE ON THE INTENTIONAL TORT EXCEPTION TO FTCA JURISDICTION IS MISPLACED

1. *The History of the Act Does Not Support That Proposition.*

The legislative history of the intentional tort exception is meager and points out the concern that it was meant to

except certain torts which "would be difficult to make a defense against, and which are easily exaggerated." *Tort Claims Against the United States: Hearings on S. 2690 Before the Sub-Comm. On S. 2690 of the Senate Comm. on the Judiciary,* 76th Cong. 3d Sess. 39 (1940) referring to the fear that the judgment would exceed the damages suffered and that the government's concern was liability for deliberate torts; but not to preclude any "injury caused by negligence [which] could [still] be considered under the bill." S. REP. No. 1400, 79th Congress 2d Sess. 33 (1946) from a statement by an Assistant Attorney General.

One must remember that the FTCA was congressionally framed with negligence liability in mind, and given that foundation, there is little difference between a situation where a government employee with a history of traffic citations drives a government vehicle through a stoplight on her way to an official meeting and crashes into an innocent victim's car (essentially a battery) causing injuries for which liability and jurisdiction for a Federal Tort Claim has always existed, and the situation where a government employee with a molesting background is hired and retained in a boarding school situation that ultimately erupts into mass child molestation, with the exception that in the former there is also negligence on the part of the Government employee who is the immediate cause of the injury.

In fact, the Legislative history reflects Congressional concern over unforeseeable and therefore unpreventable assaults and batteries, not the situation where the injury was occasioned by what at common law would be an assault and battery, but is legally and realistically the foreseeable, and perhaps inevitable result of negligence. There exists historically and traditionally those situations in which the difference between the legal proximate cause and the immediate cause of an injury has been recognized. That is to say, legally there may be more than one proximate cause of an injury.

2. *The "Arising Out Of" Language of 2680(h) Should Appropriately Be Interpreted To Encompass Preceding and/or Concurrent Negligence.*

Arizona has long held that there may be more than one proximate cause of an accident if each was an efficient cause without which resulting injuries would not have occurred, *McDowell v. Davis,* 104 Ariz. 69, 448 P.2d 869 (1968); and has refused to allow a defendant to avoid liability for his causative act by claiming that the conduct of some other person was also a contributing cause. *Ontiveros v. Boark,* 136 Ariz. 500, 667 P.2d 200 (1983). The foreseeability of an intervening act also does not relieve the original actor from liability. *Ontiveros, supra.*

Not all acts are superceding causes.

It is unclear from the language of § 2680(h) that Congress intended by its phrase "arising out of an assault, battery . . . etc." to bar any and all claims alleging government negligence, just because the last act prior to the injury was an assault and battery. See Comment, *Sec. 2680(h) of the Federal Tort Claims Act: Government Liability for Negligent Failure to Prevent an Assault and Battery by a Federal Employee,* 69 Geo. L. J. 803. That seems improbable, given the purpose of the FTCA to provide a remedy to citizens injured by governmental negligence in circumstances in which the same act of negligence would impose liability under state law, but for governmental immunity. The interest of the government in non-liability for acts it could not prevent should not lead to an overly broad definition of "arising out of" to shield the government from liability just because an assault and battery is part of the sequence of events. The charge that a narrow interpretation would make the defense of these lawsuits unusually difficult likewise is spurious when applied to how the "arising out of" language should be interpreted. After all,

it is difficult to envision why the government would have more difficulty in defending a case where negligence is a proximate cause of the injury occurring by an assault and battery, than defending a claim where only negligence is the proximate cause of the injury. Even a simple claim for negligence could include multiple negligent acts that cause a claimant's injury. This Court's ultimate interpretation of § 2680(h) should not create a jurisdictional bar to Plaintiffs' claims, because under 2680(h) the Plaintiff/claimant still must establish a duty and the breach thereof. And it is at that point that many claims will falter and fail.

Shouldn't the language "arising out of" be construed narrowly, rather than broadly, to insure that 2680(h) is applied only to claims where the very gist and essence of Plaintiffs' theory of recovery is one of the excepted basis of liability. F. Harper & F. James, *The Law of Torts,* § 29.13 (1956).

B. THE COURT MUST DETERMINE THE GIST OF THE CLAIM

The federal courts have rightly attempted to properly characterize a claim not "merely by the artistry of pleading," but whether the negligence of the government can constitute a proximate cause for an injury which stems from the intervening tortious conduct of another. Courts examine the concept of foreseeability. Where the risk or likelihood of harm is foreseeable, then the government's negligence can be said to be a proximate cause of Plaintiffs' injury and therefore it is not a "situation where a Plaintiff by virtue of artful pleading seeks to circumvent 2680(h)." *Loritts v. United States,* 489 F. Supp. 1030 (D. Mass. 1980) p. 1031. See Restatement (Second) of Torts § 449 (1965) which specifically states if

> "the likelihood that a third person may act in a particular manner is the hazard . . . which makes the actor negligent, such an act whether . . . intentionally tortious or criminal does not prevent the actor from being liable for harm caused thereby."

This restatement principle has been quoted with approval and followed in Arizona. See *Campbell v. City of Tucson,* 4 Ariz. App. 155, 418 P.2d 401, 403 (1966). The Courts should look to see whether the intentional tort involved in a tort claimant's claim is rooted in the government's negligence. Some claims only collaterally involve an assault and battery. See *Rogers v. United States,* 397 F.2d 12 (4th Cir. 1968). In those cases, properly rooted in the government's negligence, there will often be a multitude of negligent events and ongoing wrongs or negligence.

How else in the *Bennett* case would a person of Hester's proclivities have had access to the number of Navajo children that he did over the period of time he did without this rootedness in the government's own negligence. To conclude otherwise, is to conclude that the government can say to these parents and these students and all others similarly situated, that they must send their children to school or be subject to criminal prosecution, but at the same time, the government may knowingly and negligently hire molestors, murderers, and others and deny the parents and the students recovery for wrongs such employees may inflict on the children.

The foregoing comments emphasize the importance of a court looking behind the acts of the assaulting employee to determine whether negligence of other government employees created th occasion for the assault.

In determining the "gist" of the action or claim, or its "essence," the court, against the background of state law, must evaluate the actors, the location of the various incidents, the duties owed, the number and frequency of incidents, and view the intentional act in its proper perspective relative to the antecedent negligence.

C. THE PLACE OF THE ACT DETERMINES WHETHER AN INTENTIONAL TORT BARS RECOVERY.

The first feature of 28 USC § 1346(b) (1970) is language providing that claims are permitted for a "wrongful act or omission." Intentional tort claims fall within that clause. The last phrase of 1346(b) establishes the governing law, i.e. "in accordance with the law of the place." Thus, it does not create new causes of action but it provides government liability for employee misconduct when such misconduct constitutes an actionable wrong under the law of the state where it occurred, subject to other restrictions or limitations of the Tort Claims Act. I. L. Jayson, *Handling Federal Tort Claims: Administrative & Judicial Remedies,* § 217.01 (1974).

The law of the place of the tort envisioned by the Federal Tort Claims Act will result in imperfect uniformity in its application by referring the determination of liability to different jurisdictions. 28 USC § 1346, 2671, et seq., *Winston v. United States,* 305 F.2d 253 (2d Cir. 1962). Under the law of the place in *Bennett, supra,* Arizona, the questions of duty and intervening criminal acts are resolved in favor of the tort claimants as far as not allowing 2680(h) to jurisdictionally bar the claims.

A negligence action may be maintained only if there is a duty or obligation, recognized by law, which, in Arizona, requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risk of harm, *Markowitz v. Arizona Parks Board,* 146 Ariz. 352, 706 P.2d 364 (1968), and that question obviously focuses on the relationship between the parties involved. *Contempo Construction Co. v. Mountain States Telephone & Telegraph Co.,* 153 Ariz. 279, 736 P.2d 13, (1987). *Markowitz, supra,* established duties to minors using a state recreational area and these duties

included an affirmative duty to use reasonable care to make the premises safe for use by the minors. The duty to the plaintiff usually arises out of the relationship between the plaintiff and defendant but it may also arise out of a relation between the defendant and a third party whose conduct contributed to plaintiff's injury. *Ontiveros, supra.* It is the law in Arizona, as well as the general rule, that school authorities have the duty to exercise ordinary care in protecting and supervising students on the school grounds and in other areas where students are under the control of school authorities. State law sets forth a variety of duties to students including an obligation of the governing board to visit each school to examine its management, condition and needs, provide for discipline against teachers, and provide for supervision over students. Arizona Revised Statutes § 15-341 and 342; also, teachers must comply with certain duties. Arizona Revised Statutes § 15-521.

A public school district in Arizona is liable for negligence when it fails to exercise ordinary care under the circumstances. *Morris v. Ortiz,* 103 Ariz. 119, 437 P.2d 652 (1968), and as invitees the schools have a duty to make the premises reasonably safe for the students' use. *Vreeland v. State Board of Regents,* 9 Ariz. App. 61, 449 P.2d 78 (1969).

Not only does the state posit the duty but also the law on proximate cause. In Arizona, as is usually the case, negligence requires not only the defendants be negligent, and remember on FTCA claims the defendant is the government, but that the negligence be a proximate cause of the injury complained of. *Stearman v. Miranda,* 97 Ariz. 55, 396 P.2d 622 (1964). Proximate cause has been defined by Arizona courts as that which, in a natural or continuous sequence, unbroken by any efficient, intervening cause, produces the injury and without which the injury would not have occurred. *Flowers v. K-Mart Corp.,* 616 P.2d 955, 126 Ariz. 495 (1980). The act in question need not be the sole cause of the injury but it is sufficient if

it only be a legal cause and where the injury is caused by concurrent effect of two separate wrongful acts, each of them is a proximate cause of the injury, and neither can operate as efficient intervening cause with regard to the other, and neither wrongdoer can escape liability. *Nichols v. City of Phoenix*, 68 Ariz. 124, 202 P.2d 201 (1949).

Arizona follows the Restatement in the absence of Arizona law to the contrary. *Koepke v. Carter Hawley Hale Stores, Inc.*, 140 Ariz. 420, 682 P.2d 425 (1984).

Under the Restatement of Torts, Second, § 448 (1965), page 480:

> The act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third person to commit such a tort or crime, *unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.* (Emphasis added.)

It is well established that the negligence of a defendant which leads predictably, proximately, and foreseeably to the commission of a criminal act is actionable. *Jablonski by Pahls v. United States*, 712 F.2d 391 (9th Cir. 1983); *Bonsignore v. City of New York*, 683 F.2d 635 (2d. Cir. 1982); *Abdallah v. Caribbean Security Agency*, 557 F.2d 61 (3d Cir. 1974); *Sosa v. Coleman*, 646 F.2d 991 (5th Cir. 1981). This is also the law of Arizona, see *Jesik v. Maricopa County Community College District*, 125 Ariz. 543; 611 P.2d 547 (1980).

Under Arizona law, the general principle of foreseeability is applied to intervening criminal acts. *d'Hedouville v. Pioneer Hotel Co.*, 552 F.2d 886 (9th Cir. 1977), and independent criminal acts of a third person, if foreseeable, are not

superseding causes. *Central Alarm of Tucson v. Ganem*, 116 Ariz. 74, 567 P.2d 1203 (1977).

In order for the court to judge whether the government was negligent in allowing an intentional tort to occur, the foreseeability of the intervening act is emphasized. Eldridge, *Culpable Intervention As Superseding Cause*, 86 U.Pa. L. Rev. 121, 25 (1937). Today, this principle is best set forth in the Restatement (Second) of Torts § 449. To establish the actor's (i.e., the Government's) negligence, there must be a duty to prevent the intervening assault. This duty flourishes particularly in those situations where there exists special relationships between the government (actor) and the party committing the intervening intentional act or the injured person. Harper & Kime, *The Duty to Control the Conduct of Another*, 43 Yale L.J. 886 (1934). Such relationships are varied: employer/employee, parent/child, landlord/tenant, law officers/in-custody person, property owner/invitee, school/student and so forth.

The law of the place needs to be examined for a duty mandated by the special relationships. In *Bennett, supra*, various duties have been postulated under federal and state law and were breached.

In *Bennett, supra*, the government's negligence, especially in consideration of the cloistered environment of a boarding school and the duty to protect the children, set the stage for the natural, foreseeable result which inevitably occurred, and the government is the only party who could have created the situation. See *Jesik, supra*. There a student was shot by someone who threatened him, and the student had received assurances from the security guard that he would be protected. The court held that Arizona law imposes a specific duty to protect students against such torts.

The proper test is the duty/causation analysis. The *Bennett* complaint alleges facts which would support a finding that the government's negligence was the proximate cause of the

Plaintiff's injuries under Arizona law where intervening criminal acts or intentional ones do not sever antecedent negligence as the proximate cause of the injury.

CONCLUSION

For the foregoing reasons, the decision of the Fourth Circuit Court of Appeals in *Sheridan v. United States*, 823 F.2d 820 (1986), should be reversed and the case remanded for trial to the United States District Court for the District of Maryland pursuant to the Opinion of this Court that these Federal Tort Claims cases, involving intentional torts, are not to be dismissed summarily on the basis of Motions To Dismiss or Motions For Summary Judgment citing 28 USC § 2680(h) in the face of well plead claims for negligence pursuant to the substantive traditional tort law and principles of the place where the act or omission occurred. Plaintiffs with such claims are entitled to their day in Court.

Respectfully submitted,

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March 1, 1988

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APPENDIX

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February 16, 1988

Roy B. Ward, Esq.
Ward & Blue
601 North Humphreys Street
Post Office Box 789
Flagstaff, Arizona 86002

Re: *Sheridan v. United States*, No. 87-626

Dear Mr. Ward:

The petitioners, Dr. and Mrs. Sheridan, consent to your filing a brief *amici curiae* on behalf of the plaintiffs you represented in *Bennett v. United States*, 803 F.2d 1502 (9th Cir. 1986). The Clerk has advised me that no extensions of time to submit briefs will be available. Thus our brief, as well as your *amici* brief, will be due on March 4, 1988.

Very truly yours,

Michael J. Kator

MJK:nbi

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

February 22, 1988

Roy Karl, Esquire
Karl & Blue
601 North Humphreys Street
Post Office Box 789
Flagstaff, Arizona 86002

Re: Sheridan v. United States
No. 87-626

Dear Mr. Karl:

With regard to your letter of February 10, 1988, I hereby consent to the filing of an amicus brief on behalf of the plaintiffs in the case of Bennett v. United States, 803 F.2d 1502 (9th Cir. 1986).

Sincerely,

Charles Fried
Solicitor General